

STATE OF MICHIGAN  
IN THE SUPREME COURT

JOSE A. RODRIGUEZ,

Supreme Court Case No. 149222

Plaintiff/Appellee,

Court of Appeals No. 312187

v.

LC Case No. 09-028366-NO

FEDEX FREIGHT EAST, INC., RODNEY  
ADKINSON, LAURA BRODEUR, MATTHEW  
DISBROW, WILLIAM D. SARGENT, and  
HONIGMAN MILLER SCHWARTZ AND COHN  
LLP, jointly, severally and individually,

**REPLY BRIEF OF  
DEFENDANTS/APPELLANTS  
IN SUPPORT OF APPLICATION  
FOR LEAVE TO APPEAL**

Defendants/Appellants.

---

LAW OFFICES OF D. RICK MARTIN  
By: D. Rick Martin (P42484)

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.  
By: Todd R. Mendel (P55447)  
Erica Fitzgerald (P64080)

GLOTTA AND ASSOCIATES, P.C.  
By: Ronald D. Glotta (P14061)  
Sean C. Shearer (P55712)  
Attorneys for Plaintiff/Appellee  
220 Bagley, Suite 808  
Detroit, MI 48226  
(313) 963-1320

Attorneys for Defendants/Appellants  
211 West Fort Street, 15th Floor  
Detroit, MI 48226  
(313) 965-9725

---

**REPLY BRIEF OF DEFENDANTS/APPELLANTS IN SUPPORT OF APPLICATION  
FOR LEAVE TO APPEAL**

**ORAL ARGUMENT REQUESTED**

## TABLE OF CONTENTS

INDEX OF AUTHORITIES.....	ii
INTRODUCTION .....	1
ARGUMENT .....	1
I. The Court properly raised <i>Daoud</i> .....	1
II. Rodriguez attempts to mislead the Court on the law.....	2
III. Rodriguez attempts to mislead the Court on the facts.....	4
IV. Rodriguez alleges intrinsic fraud of perjury and forgery.....	7
V. Rodriguez’s remaining arguments have either been addressed or are irrelevant..	7
CONCLUSION.....	8

## INDEX OF AUTHORITIES

### Cases

<i>Daoud v De Leau</i> , 455 Mich 181; 565 NW2d 639 (1997) .....	passim
<i>Granzella v Jargoyhen</i> , 43 Cal App 3d 551; 117 Cal Rptr 710 (1974) .....	4
<i>In re Rodriguez</i> , 403 F Appx 55 (CA 6, 2010) .....	6
<i>Mack v Detroit</i> , 467 Mich 186; 649 NW2d 47 (2002) .....	1
<i>Pierson Sand &amp; Gravel, Inc v Keeler Brass Co</i> , 460 Mich 372; 596 NW2d 153 (1999).....	9
<i>Sprague v Buhagiar</i> , 213 Mich App 310; 539 NW2d 587 (1995) .....	3, 4
<i>United States v Throckmorton</i> , 98 US 61; 25 L Ed 93 (1878).....	2, 3

## **INTRODUCTION**

Rodriguez argues that: (1) the Court cannot consider *Daoud v De Leau*, 455 Mich 181; 565 NW2d 639 (1997); and (2) *Daoud* does not apply, in any event, based upon Rodriguez's view of the law and facts. These arguments are wrong. Unquestionable precedent establishes that the Court can consider *Daoud*. Further, *Daoud* plainly applies to prevent Rodriguez from bringing this action, because the complaint is based upon allegations of intrinsic fraud allegedly perpetrated by defendants during the litigation of a prior court action. The rule of *Daoud* is that a second suit based upon intrinsic fraud cannot be maintained if the complaining party had an avenue for bringing the alleged fraud to the attention of the first court and asking for relief there. *Id.* at 203. This is exactly Rodriguez's situation. In an attempt to avoid this result, he puts forth legal arguments and facts which are neither supported by the actual case law nor the actual complaint or factual record. Rodriguez's response highlights that he alleges nothing more than the intrinsic frauds of perjury and forgery. As a result, his claims cannot be maintained as a matter of law. The trial court's dismissal of this case should be affirmed.

## **ARGUMENT**

### **I. The Court properly raised *Daoud*.**

Rodriguez suggests that because the Court raised *Daoud*, that case cannot be the basis for the Court's decision. He is incorrect. The Michigan Supreme Court has broad review powers in its stewardship of Michigan's jurisprudence. Indeed, this Court has noted the "well understood judicial principle" that the Court may address legal principles not squarely addressed below. *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002). Here, the Court instructed the parties to address *Daoud* because that case may control the outcome. The parties have now had the opportunity to thoroughly brief the application of *Daoud* before the Court renders any decision.

It is entirely proper for the Court to raise *Daoud* in this manner and rely upon the case in its decision.

In addition to having the opportunity to brief the application of *Daoud*, Rodriguez cannot legitimately claim that the principles in *Daoud* have been sprung on him. In *Daoud*, the Court described its holding as dictated by the “confluence of principles related to res judicata, collateral estoppel, and proximate cause[.]” *Daoud*, 455 Mich at 202. Throughout this case, defendants have consistently pointed out that Rodriguez’s claims are barred by these same principles, including in their Application for Leave to Appeal in this Court. Thus, Rodriguez cannot claim that he is surprised to learn that the case turns on these principles. In short, it is entirely proper for the Court to apply *Daoud* to this case.

## II. Rodriguez attempts to mislead the Court on the law.

Rodriguez cherry picks authority in an attempt to construct a façade in which the law favors him. The Court should not accept his misrepresentations. On pages three and four of his brief, Rodriguez quotes from *United States v Throckmorton*, 98 US 61, 66; 25 L Ed 93 (1878), as his authority that fraud warrants relief when a party is prevented from presenting its case to the court: “[R]elief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.” This quote is the basis for Rodriguez’s entire argument. But in the *very next sentence*, the *Throckmorton* Court states: “On the other hand, the doctrine is equally well settled that **the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence**, or for any matter which was actually presented and considered in the judgment assailed.” *Id.* at 66 (emphasis added). The Court then quotes

some of the exact treatise language also quoted by this Court in *Daoud* (compare *Throckmorton* at 68 and *Daoud* at 193-94) before delivering the *Throckmorton* Court's holding:

“That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by **perjured** witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be **forged** or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases. The case before us comes within this principle. . . . To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.”

*Throckmorton* at 68-69 (emphasis added).

This is exactly what Rodriguez contends occurred in this case: a judgment against him founded on an alleged forged instrument or alleged perjured evidence. *Throckmorton* offers no support whatsoever for Rodriguez's position, and, in fact, provides even more authority upon which his claims should be dismissed.

Likewise, Rodriguez relies on the Court of Appeals case, *Sprague v Buhagiar*, 213 Mich App 310; 539 NW2d 587 (1995).<sup>1</sup> Rodriguez argues that *Sprague* supports his position that extrinsic, not intrinsic, fraud is alleged here. But *Sprague*, like *Throckmorton*, actually supports the defendants. *Sprague* states that “[a]n example of intrinsic fraud would be **perjury**, discovery fraud, fraud in inducing a settlement, or fraud in the inducement or execution of the underlying contract. . . . Because plaintiff alleges only intrinsic fraud in this case, she cannot seek relief by independent action [citation omitted]. There is not a separate cause of action. Plaintiff's remedy is to move to reopen the judgment pursuant to MCR 2.612(C). [Citation omitted]. Therefore, we

---

<sup>1</sup> Rodriguez mistakenly refers to *Sprague* as a Michigan Supreme Court case. (See Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, p 3). It is actually a Michigan Court of Appeals case.

conclude that plaintiff's claim is barred and that summary disposition should have been granted pursuant to MCR 2.116(C)(7)." *Sprague*, 213 Mich App at 314 (emphasis added).

Finally, Rodriguez relies on a 40-year-old case from a lower court in California, *Granzella v Jargoyhen*, 43 Cal App 3d 551; 117 Cal Rptr 710 (1974), contending that the facts are "strikingly similar" to the facts of this case. *Granzella* involved a forged will, which the plaintiffs did not contest in the original probate proceedings because the "blood and trust relationship" between the plaintiffs and the defendant caused them to forgo any such argument. *Id.* at 556. First, *Granzella* says up front that a forgery "would constitute intrinsic fraud." *Id.* Second, Rodriguez did not forgo his argument regarding the alleged forgery and perjury based on a "blood and trust relationship" between the parties. Instead, Rodriguez actually raised the perjury and forgery arguments. Unlike the plaintiffs in *Granzella*, Rodriguez has not given up any arguments. In short, the cases upon which Rodriguez primarily relies actually cut squarely against him.

### **III. Rodriguez attempts to mislead the Court on the facts.**

Rodriguez plays just as fast and loose with the facts (which are all contained in an undisputed record) as he does with the law. For example, Rodriguez argues that Rodney Adkinson revealed during cross-examination that his affidavit contained false assertions. (Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, p 11). Not so. In fact, Adkinson testified that he signed the unnotarized affidavit and subscribed to its contents. (Ex. J at 58-59). Likewise, Rodriguez argues that one of the attorney defendants objected to Rodriguez's attorney showing the notarized version of Adkinson's affidavit to Adkinson to confirm that he signed it. (Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, pp

11-12). But in reality, Rodriguez's attorney chose to use the unnotarized affidavit when examining Adkinson, and did not show Adkinson the notarized affidavit. (Ex. J at 58-59). The subsequent objection by one of the attorneys for FedEx was sustained by the district court. *Id.* Rodriguez argues that the defendant attorneys hatched a "carefully crafted scheme" and pretended to file a notarized affidavit. (Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, p 7). But the undisputed record shows that defendant Brodeur offered to file a notarized version only to have the *court itself* decline her offer, instead suggesting that she just give a notarized version to Rodriguez's counsel, which she did. (Ex. I at 5).

Still more egregious, Rodriguez states: his "allegation that Defendants used a 'forged' notarized affidavit to, and did, deceive and induce Plaintiff's counsel to abandon his iron-clad objection to the court considering Defendants' motion for summary judgment, has never been adjudicated, determined—or even mentioned in any prior federal court action." (Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, p 14). This is utterly false. In a letter to the Sixth Circuit, Rodriguez's attorney expressly discusses his "evidence that a *notarized* affidavit filed by FedEx's attorneys with the District Court . . . was *forged*." (Ex. E (emphasis in original)). In addition, on page 12 of his Supplemental Brief, Rodriguez *admits* that "the question of whether the 'notarized' version of Adkinson's unnotarized affidavit was a 'forged' document was raised in the employment discrimination action[.]" (Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, p 12). He only complains that the alleged forgery "was, in fact, *never* determined." *Id.* (emphasis in original). Thus, not only did Rodriguez have the opportunity to raise the alleged forgery to the federal court (which is

all that is required for *Daoud* to bar his claims here), but Rodriguez actually raised the alleged forgery to a federal court. The Court ruled against Rodriguez anyway. (Ex. D).

Rodriguez also did not, as he says, abandon his “iron-clad” objection to the unnotarized affidavit. (Errata to Plaintiff-Appellee’s Supplemental Brief in Response to Defendant-Appellant’s Application for Leave to Appeal, p 7). As discussed in much more detail in Defendants/Appellants’ Application for Leave to Appeal, pp 7-8, Rodriguez argued to the Sixth Circuit that the defendant attorneys committed misconduct by offering an unnotarized and allegedly false affidavit. The Sixth Circuit acknowledged Rodriguez’s allegations of attorney misconduct and rejected them, finding “that the district court’s opinion correctly set[] out the applicable law and correctly applie[d] that law to the facts in the record.” *In re Rodriguez*, 403 F Appx 55, 56 (CA 6, 2010). Based upon the undisputed record, Rodriguez cannot claim that he abandoned anything.

By misstating the record, Rodriguez hopes to distract the Court from this simple fact: even if Rodriguez’s misinformation was true, his claims here are still barred under *Daoud* because he had an avenue for bringing the alleged fraud to the attention of the federal court and asking for relief there. *Daoud* at 203. Rodriguez alleges nothing more than intrinsic fraud that may not be presented in a separate claim.<sup>2</sup>

---

<sup>2</sup> Throughout his Supplemental Brief, Rodriguez refers to the “undenied” allegations in his first amended complaint and complains about his lack of discovery. (See, e.g. Errata to Plaintiff-Appellee’s Supplemental Brief in Response to Defendant-Appellant’s Application for Leave to Appeal, p 15). To avoid any confusion, defendants categorically deny any allegations of misconduct, including that they offered a forged or perjured affidavit. But rather than answer Rodriguez’s first amended complaint, defendants filed a motion to dismiss, as is their right and as permitted by MCR 2.116, which the trial court granted. As contemplated by the court rules themselves, and as protection for the courts and the parties, this case does not merit an answer or discovery.

**IV. Rodriguez alleges intrinsic fraud of perjury and forgery.**

Rodriguez would have the Court believe that the instances of perjury and forgery he alleges are somehow special and are, therefore, extrinsic frauds. Setting aside defendants' contention that extrinsic fraud may still be governed by *Daoud*, Rodriguez offers no support whatsoever to defeat the overwhelming authority that alleged perjury and forgery are intrinsic fraud. *See*, Supplemental Brief of Defendants/Appellants, pp 8-13, 16-18. Rodriguez does not point to any contrary authority besides his personal contention that the perjury and forgery alleged here were somehow special.

Indeed, Rodriguez himself offers facts that completely undercut his characterization of the alleged frauds as extrinsic. As already noted above on page 5: Rodriguez admits that the alleged forgery was raised in the Employment Litigation; and Rodriguez argued the alleged forgery to the Sixth Circuit in the 2009 Fraud on the Court Action. These bring Rodriguez's claims squarely within the ambit of *Daoud*, which bars a subsequent action where the complaining party had "an avenue for bringing the fraud to the attention of the first court[.]" *Daoud*, 455 Mich at 203. Rodriguez admits that he had such an avenue and, in fact, raised the alleged forgery. *Daoud* applies whether or not the first court rendered a determination on the fraud, so Rodriguez's grievance is unavailing.

**V. Rodriguez's remaining arguments have either been addressed or are irrelevant.**

The remainder of Rodriguez's Supplemental Brief was either already addressed by defendants or misses the mark entirely. For example, Rodriguez attaches some significance to the damages sought in the state court action. (Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, p 12). But defendants showed that *Daoud* applies regardless of the relief sought. (Supplemental Brief of Defendant/Appellants, p 15). Likewise, Rodriguez summarily states that the federal court's

dismissal of the underlying action has no res judicata effect. (Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, p 14). But pages 23 to 32 of Defendants/Appellants' Application for Leave to Appeal explains why that dismissal *does* have res judicata effect.

Rodriguez also tries to distract the Court from *Daoud*'s application by offering a host of cases that have no bearing on the issue before the Court. Rodriguez cites numerous cases for the premise that motions for summary judgment must be supported by notarized affidavits. (Errata to Plaintiff-Appellee's Supplemental Brief in Response to Defendant-Appellant's Application for Leave to Appeal, pp 7-11). That is simply not what this appeal is about and, in fact, underscores the rule from *Daoud*. The time and place to have raised the issues Rodriguez tries to put before the Court was when Rodriguez was in front of the bankruptcy, federal district court, and Sixth Circuit in the original action (or even in the 2009 Fraud on the Court Action), and his avenue to do so was the Federal Rules of Civil Procedure. That Rodriguez attempts to raise the issue again here shows why the *Daoud* Court recognized the need for an end to litigation.

### **CONCLUSION**

The rule from *Daoud* applies to this case. The alleged frauds all occurred during proceedings before a federal judge. Rodriguez had an opportunity to raise the issues in that action (and in another action in front of the same judge and courts) and did—repeatedly. But he lost. Now Rodriguez wants yet another bite at the apple. It is time to put a stop to this litigation once and for all.

If the Court is unconvinced that *Daoud* controls the outcome of this case, defendants continue to urge the Court to reverse the Court of Appeals' decision based on the arguments of collateral estoppel, res judicata, and the other bases raised in defendants' Application for Leave

to Appeal. Among other issues raised in that application, defendants argued that the Court should reverse its decision in *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372; 596 NW2d 153 (1999), based on Justice Taylor's dissent in that case. This case offers the Court an opportunity to correct an outdated quirk in Michigan's jurisprudence on the res judicata effect in a state court proceeding of a federal court's summary dismissal on the merits. In the interest of conserving judicial resources and preventing repetitive lawsuits, this Court should consider overruling *Pierson Sand & Gravel*.

In conclusion, defendants request that the Court enter a peremptory order based upon *Daoud* vacating the Michigan Court of Appeals decision and reinstating the trial court's dismissal of the plaintiff's complaint with prejudice. If the Court is inclined to address *Pierson Sand & Gravel* and the other issues raised in defendants' Application for Leave to Appeal, then defendants request that the Court issue an opinion reversing the Court of Appeals and reinstate the trial court's dismissal with prejudice.

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.

By: /s/ Todd R. Mendel  
Todd R. Mendel (P55447)  
Erica Fitzgerald (P64080)  
Attorneys for Defendants/Appellants  
211 West Fort Street, 15th Floor  
Detroit, MI 48226  
(313) 965-9725

Dated: December 11, 2014

445761